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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. A-881

J. W. BATESON, INC., Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE UNITED STATES COURT OF CLAIMS

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QUESTIONS PRESENTED

Whether the disputes provisions of a government contract that forces a party to the contract through administrative review that does not allow resolution of all disputes evolving under the contract is in violation of the due process provisions of the Constitution; and (2) whether under said dispute provisions and review the standard and burden of proof cannot be met because of intentional and harmful acts done to the Petitioner and its records by the Government is a violation of due process provisions of the Constitution.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. A-881

J. W. BATESON, INC., Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

J. W. BATESON, INC., the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims of December 12, 1980, of which rehearing was denied on February 6, 1981, adopting the Trial Division's Opinion of May 21, 1980.

OPINIONS BELOW

The Order of the United States Court of Claims of December 12, 1980, is printed in Appendix A hereto, infra, page 21. The Trial Division's Opinion in the United States Court of Claims which was adopted as the Order of this Court is printed in Appendix hereto, infra, page 24. The Order Denying Rehearing is printed in Appendix A hereto, infra, page 62.

JURISDICTION

The judgment of the United States Court of Claims, (Appendix A, infra, page 21) was entered on December 12, 1980. The timely petition for rehearing was denied on February 6, 1981 (Appendix A, infra, page 62). The jurisdiction of the Supreme Court is invoked under Title 28 of the USCA§1255.

QUESTIONS PRESENTED

Whether the disputes provisions of a government contract that forces a party to the contract through administrative review that does not allow resolution of all disputes evolving under the contract is in violation of the due process provisions of the Constitution; and (2) whether under said dispute provisions and review the standard and burden of proof cannot be met because of intentional and harmful acts done to the Petitioner and its records by the Government is a violation of due process provisions of the Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the fourth section of the Fifth Amendment to the Constitution of the United States, which provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private

property be taken for public use, without just compensation.

STATEMENT OF CASE

Wrongful and intentional acts are the basis of this action brought by J. W. Bateson on behalf of the real party at interest,*Fidelity Sound, Inc. The decision of the Armed Services Board of Contract Appeals 19823 and 22337 were reviewed by the United States Court of Claims under the judicial review standards set forth in the Wunderlich Act 41 USC §321, §322, seeking judicial review of a breach of contract. The contract (DACA-21-71-C-0061 for the construction of the United States Army Hospital at Fort Gordon, Georgia) was awarded to Petitioner on April 9, 1971, and included the requirements for an

*Fidelity Sound, Inc. is a wholly owned subsidiary of RVA Corporation, a publically held corporation, with its principal place of business at 1212 City National Bank Building, Miami, Florida 33130.

audio-nurse call systems which required facilities for patient communications. Truland, Fischbach and Moore were awarded the electrical contract under Petitioner and Fidelity Sound, the real party at interest, was a subcontractor of Truland, Fischbach and Moore. The contract was awarded on July 12, 1971. Resulting appeals to the Armed Services Board of Contract Appeals resulted in equitable adjustment of $234,536.26 to Petitioner and a review was made to the United States Court of Claims by the Petitioner. Review was limited to Wunderlich Act provisions even though Petitioner south review on the basis os (1) a breach f contract due to intentional and wrongful acts of an employee of the Corps of Engineers; and (2) the standards of proof applied to the Petitioner in this appeal before the Board.

THE ACTS

Claims relating to the actions of the United States Corps of Engineers' employee, Mr. Utermark, was raised in testimony before the Armed Services Board of Contract Appeals. The actions are such that they are indicative of intent to change the specifications to prevent the Petitioner from complying with them. Mr. Utermark, on several occasions, attempted to have the specifications changed so only one special system would comply. On at least five different occasions he disapproved the submittals in total when in fact they have been found by the Board to meet the specifications required. On at least one occasion Mr. Utermark wrongfully attempted to influence the writer of the specifications. The Petitioner was required to perform different duties

from those in the contract, more particularly, submitting various submittals for over a year and finally having to install a system which the Board found a "small wonder" that the Petitioner was able to comply. Mr. Utermark's actions reflect his intentions. Granted, if the actions had been totally harmless the proper relief would have been an equitable adjustment, but under these facts his intentional actions were taken to prevent the Petitioner from complying with the contract specifications. The Armed Services Board of Contract Appeals has refused to review such claims for relief.

BURDEN OF PROOF

The Armed Services Board of Contract Appeals prevented testimony as to the wrongdoings and intentional acts

of the employee of the Corps, Mr. Utermark. Elimination of said testimony was that the Board had no power to render any decision that might have related to those acts. The Corps itself prevented access to Mr. Utermark by having him placed in a station in the Middle East during this litigation.

Also, the process of requiring numerous submittals; waiting unusual lengths of time for a decision by the local Contracting Officer; extensive hearings, both as to entitlement and as to quantum, totally destroyed the company as it proceeded through the administrative process. The damage was enormous to the real party at interest, Fidelity Sound, and such a large financial injury cannot be sustained by a company of this size. The actual total destruction was the anticipated

result of the delay.

Now, through the application of burden of proof, the Corps of Engineers and the Armed Services Board of Contract Appeals demands Petitioner to prove its case with evidence which has obviously been destroyed and makes its demand through the applicable rules of the Armed Services Board of Contract Appeals as used in the disputes clause of the contract. The administrative procedures before the Armed Services Board of Contract Appeals are of a quasi-judicial character and the Petitioner's rights must be protected by a fair and open hearing. The proceedings must satisfy pertinent demands of due process.

The evidence submitted as to the damages meeting the burden of proof set forth in the decisions. Records

were made available to the Court and the Court found them too burdensome to receive. Administrative convenience is not in and to itself adequate support for infringement of a constitutional right. Due process which was not allowed in this instance requires that the Board allow Petitioner the opportunity not only to present the evidence but also the opportunity to argue said evidence, which was not done.

REASONS FOR GRANTING WRIT

The right under the due process clause of the United States Constitution to a full hearing includes the right of the party to introduce evidence Baltimore & O. R. Co. v. United States, 298 US 349. The right to present evidence is essential to the fair hearing required by the due process clause. Jenkins v.

McKeithen, 395 US 411. The rights under the due process clause includes the right to have the judicial findings based upon the evidence submitted. Baltimore & O. R. Co. v. United States, 298 US 349. Due process implies the right to contradict by proof every material fact which bears on the question of the right involved. The exclusion of competent and relevent evidence on the grounds that the hearing officer is familiar with the facts surrounding the relevant evidence is not due process. At the second hearing as to entitlement before the Armed Services Board of Contract Appeals, the Board refused to hear testimony and evidence as to wrongful and intentional acts of the employee of the Corps of Engineers and in its opinion in the decision of the Court of Claims, the Court of Claims totally

circumvented the arguments of the Petitioner that said wrongful and intentional acts resulted in breach of contract. The right to present proof and argument is applicable in administrative proceedings. DeLaRama v. DeLaRama, 241 US 154. The due process clause forbids an agency to use evidence in a way to foreclose an opportunity of presentation by Petitioner. Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 US 281, reh den, 420 US 956.

Also, the rules of evidence as applied by the Board exceed the bounds in this case and in most cases of a reasonable level of scrunity that can be applied to said presumptions and has, thus, excluded Petitioner from a fair hearing. The damages and costs found by the first hearing before the Armed

Services Board of Contract Appeals to exist prevented the Petitioner, more particularly, the Fidelity Sound, Inc., the real party at interest, from sustaining itself through the long administrative appeal process. The harmful actions of the Corps of Engineers resultingly deprived the Petitioner under the established rules as applied by the Armed Services Board of Contract Appeals, under the pretense of regulating evidence from exhibiting or establishing its rights. It is within the power of government to establish the burden of proof in civil cases provided it is reasonable. In cases of unreasonableness the courts have not hesitated to strike down rules or statutes unfairly shifting the burden of proof. First Unitarian Church v. County of Los Angeles, 357 US 545; Speiser v. Randal, 357 US 513,

reh den, 358 US 860. Also, in this particular case total destruction of Fidelity Sound prevented other reasonable and practical means of establishing pertinent facts upon which a decision could have been reached. Mechanical applications of the rules of evidence are not appropriate when used to defeat the ends of justice, especially when individuals seek to introduce testimony which is pertinent but the hearing officer excludes such testimony and especially when the testimony is highly relevant to the critical issues of the hearing. Green v. Georgia, 60 Lawyers Addition, 2nd 738,99 Supreme Court 2150 (1979 case). A party's right to protect itself when involved in quasi-judicial proceedings includes the right to make argument; to make proof or introduce evidence; to meet the claims of opponent,

and to deny, explain, controvert or rebut the claims of the opposing party. United States v. Storer Broadcasting Company, 351 US 192. Findings cannot be said to have been fairly reached unless material evidence which might impeach the position of the opposing party as well as evidence that would support the claimant, have been heard and waived. NLRB v. Indiana and M. Electrical Company, 318 US 9.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

J. CARLISLE OVERSTREET
Attorney for Petitioner

APPENDIX

MISCELLANEOUS

6. DISPUTES (1964 JUN)

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the head of the agency involved. The decision of the head of the agency or his duly authorized representative for the determination of such appeals shall be final and conclusive.

This provision shall not be plead in any suit involving a question of fact arising under this contract as limiting judicial review of any such decision to cases where fraud by such official or his representative or board is alleged: Provides, however, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This "Disputes" clause does not preclude consideration of questions of law in connection with decisions provided for in paragraph (a) above. Nothing in this contract, however, shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

IN THE UNITED STATES COURT OF CLAIMS

No. 86-79C

J. W. BATESON, INC.)
)
V.)
)
THE UNITED STATES)

Construction contract; Wunderlich Act review; constructive change; equitable adjustment; breach of contract; cardinal change.

J. Carlisle Overstreet, attorney for record, for plaintiff.

Robert L. Brombaugh, with whom was Assistant Attorney General Alice Daniel, for defendant. Pollie Harris McElroy, of counsel.

Before FRIEDMAN, Chief Judge, DAVIS and KUNZIG, Judges.

ORDER

This case comes before the court on plaintiff's request, filed June 25, 1980, for review by the court of the recommended decision of Trial Judge James F. Merow, filed May 21, 1980, pursuant to Rules 54 and 166 on the parties' cross-motions for summary judgment, and on plaintiff's motion for de novo trial, having been submitted on the briefs and oral argument of counsel. Upon consideration thereof, since the court agrees with the trial judge's recommended decision, copies of which have been furnished to the parties, it hereby affirms and adopts the recommended decision as the basis for its judgment in this case.

IT IS THEREFORE CONCLUDES AND ORDERED that the ASBCA decision awarding Plaintiff and equitable adjustment of $234,536.26 is entitled to finality under the judicial review standards of

41 U.S.C §§ 321, 322. Accordingly, defendant's motion for summary judgment is granted, plaintiff's motions for summary judgment and de novo trial are denied and plaintiff's petition is dismissed.

BY THE COURT

s/Daniel M. Friedman
Daniel M. Friedman

Chief Judge

DEC 12 1980

IN THE UNITED STATES COURT OF

CLAIMS TRIAL DIVISION

NO. 86-79C

(Filed May 21, 1980)

J. W. BATESON, INC.)
)
V.)
)
THE UNITED STATES)

Construction contract; Wunderlich Act review; constructive change; equitable adjustment; breach of contract; cardinal change.

ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

J. Carlisle Overstreet, attorney of record, for plaintiff.

Pollie Harris McElroy, with whom was Assistant Attorney General Alice Daniel, for defendant.

OPINION*

*The opinion and recommended conclusion of law are submitted in accordance with Rules 54 and 166.

MEROW, Trial Judge: This matter is before the court on motions for summary judgment addressed to the finality of the Armed Services Board of Contract Appeals (ASBCA) decision, issued October 27, 1978, in Appeal No. 22337, under Contract DACA 21-71-C-0061, for the construction of a United States Army Hospital at Fort Gordon, Georgia. In addition, plaintiff seeks a trial de novo in this court.

The Fort Gordon hospital contract (DACA 21-71-C-0061) was awarded to J. W. Bateson on April 9, 1971. Included in the specifications was a requirement for an audio-visual nurse call system which required "***facilities for patient communication, program entertainment, and TV control." Various subcontractors, submitted bids to J. W. Bateson for the nurse call system. After being awarded the hospital contract, Bateson entered

into a subcontract with Truland, Fischback and Moore (TFM) for the electrical work on the project and, in turn, on July 12, 1971 TFM subcontracted the nurse call system to Fidelity Sound, Inc. (Fidelity) for $273,000. ASBCA Appeal No. 22337 and the instand litigation concern the amount that was awarded on claims submitted by Bateson to the Government on behalf of the sub-subcontractor, Fidelity.

As issued, the nurse call specifications for the Fort Gordon hospital project contemplated the use of a standard product but had been developed by marrying the specifications of systems offered by two manufacturers, Executone and Motorola, in a way so that neither of these systems could completely meet the requirements.

Fidelity prepared its bid to TFM on the basis of a nurse call system manufactured by Altec-Lansing. To comply with a requirement that the items to be installed in the project be approved by the contracting officer, Fidelity, on November 15, 1971, submitted a proposal to install a nurse call system manufactured by Picker-Briggs. This was disapproved on December 7, 1971 and, after further revision by Fidelity, was again disapproved on March 15, 1972. Fidelity then, on May 8, 1972, proposed the use of the Altec-Lansing system on which it had based its bid to TFM and this was disapproved on May 24, 1972. Fidelity, on May 25, 1972, contacted the distributor for the Executone nurse call system (Righton Distributing Company) and obtained a quotation of $225,115, including $19,921 for supervision of the

installation, testing, and a 12-month guarantee, but did not then submit this system to the contracting officer. Rather, on June 27, 1972, a proposal to use a system manufactured by Dukane was submitted. This proposal was disapproved on July 7, 1972. In August 1972 discussions were held by representatives of the Government's contracting officer, TFM, Fidelity and the distributor of Executone equipment concerning possible modifications of the nurse call system as specified and an informal submission of Executone equipment was provided to TFM at the request of Fidelity. A formal proposal to utilize the Executone system was then transmitted to the Government by Fidelity and was received and approved on September 1, 1972. The specifications for the nurse call system were modified by the contracting officer

on September 6, 1972 (modification No. 51) to somewhat expand the system and enlarge its capacity and capabilities. The modification noted that "The system submitted and conditionally approves is manufactured by Executone." By modification No. 51, the hospital contract price was increased by $225,000, subject to final adjustment.

On December 4, 1973, Fidelity submitted a claim to TFM to forward to the contracting officer on the Fort Gordon hospital contract. Fidelity's claim stated, in part, as follows:

> Fidelity Sound, Inc. (hereinafter referred to as Claimant) presents this claim for additional cost and expenses on the Fort Gordon Hospital DACA-21-71-C-0061 (hereinafter referred to as Project) due to the interpretation and ambiguity of the specifications resulted in the proprietary demand for an Executone system when the specifications were actually open specifications.
> * * * * * * * * *

COST DIFFERENTIAL	$128,000.00
(1) Warranty Work	12,000.00
(2) Supervision	3,000.00
(3) Salary and Travel Expenses	31,000.00
(4) Fifteen (15) Months' interest on $25,000 at 11.5 % interest	
	$177,693.00

From the day that the approving authority has forced the Executone System on Fidelity Sound, Inc., Fidelity Sound, Inc. has suffered a net expense of $177,693.00. Therefore, in addition to this sum, we are requesting the following:

Net Expense	$177,693.00
Ten (10%) Percent Overhead	17,769.00
	$194,862.00
Profit	19,486.00
	$214,348.00
Cost of Interest on $194,867.00 [sic] to date at 11.5% interest	
	$236,757.00

* * * * * * *

By letter dated September 16, 1974 to the United States Corps of Engineers, Fidelity amended its claim to $570,030.[1/]

1/ The amended claim consisted of the following items: $141,440 (total material cost); $88,853 (total labor cost); $34,543 (supervision and engineering - 15 percent of labor and materials); $34,543 (sales expense and miscellaneous - 15 percent of labor and materials); $55,270 (general and administrative - 24 percent of labor and materials); $129,534 (claim expense - interest of $46,639, executive salary and travel of $31,000, legal expenses of $35,000 and general and administrative expense of $16,895 or 15 percent of the total for interest, executive salary and travel and legal expense); $48,418 (profit at 10 percent of the total job cost of $484,183); $37,429 (unilaterial change order).

The claim was denied by the contracting officer and an appeal No. 19823, was taken to the ASBCA pursuant to the disputes clause in the contract. The proceedings in Appeal No. 19823 were limited to the issue of entitlement.

On July 26, 1976 the ASBCA issued its decision ruling, in relevant part, as follows:

> The Government, of course, has long-recognized right to insist on the product conforming to the bid specifications under contract. But the requirement for a standard product created the subtle suggestion of the commercial availability of a complying system. It was that fact coupled with the Government's application of its view of the standard of quality it thought had been called out that forced the appellant to greater expense than it reasonably anticipated. Thus, in applying its criteria of acceptability the Government constructively changed the specifications for which the appellant is entitled to an equitable adjustment.

Following this ASBCA determination on entitlement, a revised claim of $2,963,325.83 was submitted by letter dated February 1, 1977.[2/] At the request

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2/ The letter set forth the claim as follows:

Material - Exhibit A	$128,094.48
Labor - Exhibit B	58,973.66
Total Excess Material & Labor	$187,068.14
Associated Charges on Direct Excess Costs	
Supervision - 15% of Material & Labor	$ 28,060.22
Eng. & Estimating - 15% of M & L	28,060.22
Job Coordination - 5% of M & L	9,353.41
	$ 65,473.85

(Note: All percentage charged as previously approved on change orders.)

2/ Cont'd

General & Administrative - 15% of M & L	$ 28,060.22
(See Exhibit C)	
Extraordinary Costs (See Exhibit D)	$ 98,847.00
Interest Expense (as of 11/30/76) (See Exhibit E) Per Diem Interest Cost - $211.17	$236,942.12
TOTAL EXCESS COSTS	$616,391.32
Porfit - 10%	61,639.13
Sub-Total	$678,030.45
Extraordinary Damages 11/1/73 - 10/31/76 (See Exhibit E)	$1,544,714.00
TOTAL COST TO COMPANY	$2,222,744.40
Claim Legal Fees	740,581.43
TOTAL CLAIM	$2,963,325.83

of the Corps of Engineers, the Defense Contract Audit Agency (DCAA) audited Fidelity's records and submitted a report on March 9, 1977, which was made available to Fidelity. Protracted negotiations did not produce an agreement as to the amount of the adjustment and on July 14, 1977 the contracting officer issued a decision that $228,867 was the appropriate amount. Again, an appeal (No. 22337) was taken to the ASBCA.

In the proceedings before the ASBCA, the appellant presented the testimony of:

Marvin Pearlman, a Certified Public Accountant who served as the comptroller for Fidelity; Frederick J. Fink, an officer of Fidelity; Charles Byrom, an officer of Fidelity; and Ronald L. Fine, an officer of, and major shareholder in Fidelity.

The Government's witnesses before the ASBCA were:

Gilbert Gechman, a DCAA auditor; Robert E. Utermark, the representative of the contracting officer for electrical matters; Robert A. Rowe, resident engineer for the Corps of Engineers on the Fort Gordon hospital project; Charles A. Baldwin, an electrical inspector for the Corps of Engineers on the Fort Gordon hospital project, Forest H. Cain, vice president, Righton Distribution Co.; Charles Brown, DCAA regional supervisory auditor; and Matthew D. Thomas, assistant district counsel, Corps of Engineers.

By an opinion issued October 27, 1978, the ASBCA determined that the appellant was entitled to an equitable adjustment of $234,536.26 on the nurse call claim as follows:

Material	
Claimed	128,094.48
Denied	9,488.48
Sustained	118,606.00
Labor	
Claimed	58,973.66
Denied	58,548.66
Sustained	425.00
Total Excess Labor & Materials	
Claimed	187,068.14
Denied	68,037.14
Sustained	119,031.00
Overhead	
Claimed	93,514.07
Denied	39,569.22
Sustained	53,944.85
Extraordinary Costs	
Claimed	98,847.00
Denied	98,847.00
Sustained	0
Interest Expense (through 10/31)	
Claimed	354,727.00
Denied	354,727.00
Sustained	0
Total Excess Costs	
Claimed	734,156.21
Denied	561,180.36
Sustained	172,975.85

Profit at 10%	
Claimed	73,415.62
Denied	56,118.03
Sustained	17,297.59
Subtotal	
Claimed	807,571.83
Denied	617,298.03
Sustained	190,273.44
Extraordinary damages	
Claimed	1,544,714.00
Denied	1,544,714.00
Sustained	0
Total Cost to Company	
Claimed	2,325,285.83
Denied	2,162,012.39
Sustained	190,273.44
Legal Fees	
Claimed	740,581.43
Denied	740,581.43
Sustained	0
TOTAL CLAIM	
Claimed	3,092,867.26
Denied	2,902,593.82
Sustained	190,273.44
Sales Tas TFM	3,558.18
	193,831.62
1/TFM Profit & Overhead at 10%	19,383.16
	213,214.78
1/J.W.Bateson Profit & Overhead at 15.5%	21,321.48
	234,536.26

Previously paid by Government on Modification P 149 (Parts I & II) 228,867.00 3/

AMOUNT DUE J. W. BATESON AND SUBCONTRACTORS 5,669.26

3/ As to the $5,669.26, the sum which remainded to be paid in addition to the $228,867 which had been previously paid by the Government on the basis of the contracting officer's decision, the ASBCA concluded that Fidelity's share was $904.05, TFM's share was $4,004.40 and J. W. Bateson's shares was $760.81. TFM's share included $3,558.18 in sales tax expense.

On March 8, 1979, plaintiff filed its petition in this matter, setting forth a claim against the United States for $3,600,404.51 as of April 21, 1979, plus $211.17 per day thereafter until payment. Plaintiff's petition sought review of the ASBCA's determinations: (1) concerning the number of labor hours for the installation of the equipment; (2) denying recovery for delay asserted to be caused by the denial of six submittals by Fidelity; (3) denying the interest cost claimed; and (4) denying the extraordinary cost damages claimed.

Plaintiff's petition also alleges that:

> The amount due to the Plaintiff was caused by the intentional, arbitrary, and capricious breach of the contract in question, causing delays to plaintiff, through Fidelity, and resulting in adverse effects on Fidelity's ability to finance this contract and other contracts

both with defendant and commercial entities.

Defendant's answer, filed June 6, 1979, set forth the Government's position that the ASBCA decisions in Appeals Nos.19823 and 22337 are final under the judicial review standards as set forth in the Wunderlich Act, 41 U.S.C. §§ 321, 322.

Plaintiff's motion for summary judgment, filed August 7, 1979, seeks judicial review of several of the determinations made by the ASBCA in Appeal No. 22337.[4/] In its opposition

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4/ Plaintiff addresses argument in the motion only to the ASBCA's determinations:

(1) that the applicable burden rate was 45.32 percent;

(2) that the use of electricians, at a higher rate of pay, was not required in the installation of the nurse call system;

(3) that 100 hours of excess labor time was required;

(4) that no amount for additional time and travel for Fidelity executives was established.

to defendant's cross-motion for summary judgment filed January 2, 1980, plaintiff adds argument in support of the remaining items of tis claims denied by the ASBCA and/or seeks a de novo trial by asserting that the additional damages claimed are premised upon a breach of contract asserted to have been committed by the Government in rejecting Fidelity's submittals of nurse call systems prior to the approval of the Executone equipment on September 1, 1972. Plaintiff argues that the rejections of the submittals made by Fidelity, other than that for the Executone system, were made in bad faith by the contracting officer's representative for electrical matters, and that the requirement to install the Executone system constituted a cardinal change, one outside of the scope of the contract.

Defendant opposes plaintiff's assertion of a breach of contract claim in an opposition brief as not submitted in accordance with the Rules but also argues that no valid assertion as to the existence of a cardinal change has been made.

It is concluded that plaintiff has not established any basis upon which it could be rules that a cardinal change claims has been asserted in this matter calling for de novo proceedings in this court.5/ The ASBCA has ruled that

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5/ Plaintiff's failure to raise the issue of cardinal change before the ASBCA could preclude its inital assertion in plaintiff's opposition brief, filed January 2, 1980. Conrac Corp. v. United States, 214 Ct.Cl. 561, 558 F.2d 994 (1977). However, in view of the conclusion that a situation within the cardinal change doctrine has not been set forth either before the ASBCA or in the papers filed herein, there exists no need to rule on this point.

plaintiff is entitled to an equitable adjustment under the contract involved covering any increased costs reasonably incurred as a result of the criteria of acceptability applied by the Government with respect to the nurse call system submittals. A "cardinal change" occurs when the Government effects an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for. Edward R. Marden Corp. v. United States, 194 Ct. Cl. 799, 442 F.2d 364 (1971). The contract, as bid, specified a nurse call system and plaintiff, through Fidelity, installed a nurse call system, albeit not using the brand of equipment it originally intended to supply. This circumstance does not fit the description of a cardinal change. See Aragona

Constr. Co. v. United States, 165 Ct. Cl. 382, 390-91 (1964). If a contractor is incorrectly required to install some brand name equipment when other equipment equal thereto would have met the specifications, this court has recognized that appropriate relief is provided by an equitable adjustment under the changes clause utilized in Government contracts. Jack Stone Co. v. United States, 170 Ct. Cl. 281, 344 F.2d 370 (1965).

Plaintiff's assertion of "bad faith" in connection with the rejection of equipment other than Executone's nurse call system in no way demonstrates "bad faith" directed at Fidelity. If the asserted bad faith existed, perhaps other manufacturers of nurse call equipment would have grounds to complain, but Fidelity was not such a manufacturer.

Plaintiff has alleged no specific instance of malicious intent or "animus" directed against Fidelity on the part of the Government.

In this circumstance, general "bad faith" allegations concerning an asserted preference for one brand of equipment do not create a triable issue of fact such as to convert this matter into a de novo action for breach of contract. Kalver Corp. v. United States, 211 Ct. Cl. 192, 543 F.2d 1298 (1976), cert. denied, 434 U.S. 830 (1977).

Accordingly, the issue which must be resolved is limited to whether the decision of the ASBCA in Appeal No. 22337 is final under the judisical review standards of the Wunderlich Act, 41 U.S.C. §§ 321, 322.

The changes clause in the contract for the Fort Gordon Hospital project provides:

* * * * * *

> (d) If any change under this clause causes an increase or decrease in the contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any order, an equitable adjustment shall be made and the contract modified in writing accordingly: * * * And provided further, that in the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the contractor in attempting to comply with such defective specifications.

The determination of the amount of an equitable adjustment by a contract appeals board is generally one of fact, subject to limited review by this court. United States v. Callahan Walker Constr. Co., 317 U.S. 56, 61 (1942); Koppers Co. v. United States, 186 Ct. Cl. 142, 405 F.2d 554 (1968). The purpose of the changes provision is to compensate a

contractor for the unanticipated and extra out-of-pocket expenses it incurred in performing the contract as a result of a change. Coley Properties Corp. v. United States, 219 Ct. Cl. ___, 593 F.2d 380 (1979); Bruce Constr. Corp. v. United States, 163 Ct. Cl. 97, 100, 324 F.2d 516, 518 (1963). The equitable adjustment may not properly be used as an excuse to remedy a loss suffered by a contractor who has simply underestimated an item in his bid. S. N. Nielsen Co. v. United States, 141 Ct. Cl. 793, 796-97 (1958). However, an equitable adjustment must include reimbursement for those increased costs of performance which were the direct and necessary result of the change. Paul Hardeman, Inc. v. United States, 186 Ct. Cl. 743, 406 F.2d 1357 (1969). When a dispute arises as to the amount of an equitable

adjustment, the party seeking the contract price adjustment has the burden, before the contract appeals board, of establishing the existence of the relevant costs by a preponderance of the evidence. Teledyne McCormick-Selph v. United States, 218 Ct. Cl. ___, 588 F.2d 808 (1978).

Viewed in accordance with the principles stated, it is concluded that the ASBCA's decision in Appeal No. 22337 is final and plaintiff has not established any valid basis upon which the determination could be overturned.

Plaintiff first takes exception to the finding by the ASBCA that a burden rate (overhead) of 45.32 percent should be applied in determining Fidelity's performance cost. Plaintiff assets that a determination of 50 percent should have been made. The record before

the ASBCA demonstrates that the 45.32 percent rate is supported by substantial evidence consisting of the audit conducted by the DCAA and the testimony of the auditor. No basis has been shown to overturn the Board's findings.

Plaintiff takes exception to the decision by the ASBCA that electricians were not required to install the Executone equipment such that a portion of the labor cost Fidelity actually incurred in the performance of this work was not reasonable. The evidence before the ASBCA established that Fidelity used a labor rate of $4.25 per hour in its original bid to TFM when it contemplated installing the Altec-Lansing nurse call system. Fidelity had contemplated installing the system using technicians who were members of the

Communications Workers of Amercia. In the actual performance of the contract work, Fidelity arranged for TFM to provide the labor used to install the nurse call system, which labor costs was then billed to Fidelity at the $9.65 hourly rate established for electricians who were members of the union utilized by TFM. The testimony before the ASBCA was in conflict as to whether the use of union electricians at the rate of $9.65 was caused by increased complexity of the Executone equipment as compared to that manufactured by Altec-Lansing, or whether it was simply necessary to use electricians from TFM's union source on this contract such that Fidelity's original bid estimated was in error. The Board concluded that Fidelity did not establish that the use of union electricians was caused by the

actions of the Government in the approval of the Executone equipment so that the increase in hourly labor cost over Fidelity's bid estimate was no recoverable as a part of the equitable adjustment. A review of the record evidence demonstrates that the Board's finding has adequate record support. Normally, actual increased costs incurred would control. Ford Constr. Co. v. United States, 202 Ct. Cl. 1133 (1973). However, in the circumstances where an original bid estimate was in error, increased cost which occurs as a result may not be reimbursed by means of an equitable adjustment. Pacific Architects and Engineers, Inc. v. United States, 203 Ct. Cl. 499, 491 F.2d 734 (1974). As plaintiff did not establish before the ASBCA that the switch to TFM's union electricians was caused by

any Government action, no grounds exist to overturn the Board's decision denying recovery of the increased labor cost.

Plaintiff also takes exception to the findings by the ASBCA, in the nature of a jury verdict, that 100 extra hours were expended as a result of the change at issue. The testimony as to the amount of extra labor required as a result of the change was in conflict. Plaintiff presented only a "total cost" approach, which the ASBCA rejected because the amount of excess labor could be determined by other methods and the total cost approach did not pinpoint the extra labor hours attributable to the change as contrasted with other causes, such as the alterations made under Modification 51. The Board's rejection of plaintiff's total cost method in these circumstances was correct. Boyajian v.

United States, 191 Ct. Cl. 233, 423 F.2d 1231 (1970). Rather than denying any recovery as to labor cost for failure of proof, a result which would have been possible, Joseph Pickard's Sons Co. v. United States, 209 Ct. Cl. 643, 532 F.2d 739 (1976), the ASBCA utilized a jury verdict approach to find that 100 hours of extra labor were attributable to the change at issue. This determination is supported by the testimony of an expert witness for the Government, although his opinion was that some 50 to 70 hours of extra labor were incurred,[6/] and no basis has been shown

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6/ Another witness for the Government compiled unsubstantiated figures cited during the trial of this matter before the Board and then testifed to a figure of 779 hours of extra labor. The ASBCA discounted this evidence and this result is within the province of the facts on a dispute arising under the contract.

on which the Board's finding on excess labor hours could be overturned upon judicial review.

Plaintiff next takes exception to the ASBCA's findings that no amount of additional cost was established for the work time and travel expended by executives of Fidelity as allocated to the change at issue. Plaintiff's testimony was that a certain percentage of execu- time officer time would normally be expended on the contract but, because of the problems on the instance contract, a substantially greater percentage of such time was involved. No records or documentary evidence were introduced before the Board to support the general testimony as to the time and travel expense allocations claimed. The ASBCA rules that it had no credible evidence on which to establish a dollar amount as

to any additional executive time and travel attributable to the change at issue. Upon judicial review, absent contradictory uncontrovertible documentary evidence or physical fact, this court normally defers to the judgment of the Boards of Contract Appeals on the credibility of witnesses who have testified before them. Sternberger v. United States, 185 Ct. Cl. 528, 401 F.2d 1012 (1968). In the instant situation where additional overhead of $53,944.85 has been awarded for the change (excluding the overhead and profit amounts of $19,383.16 for TFM and $21,321.48 for J. W. Bateson), and additional sums to be allocated to the change from amounts expended for corporate officers' salaries and travel should have been supported by evidence the ASBCA could deem creditable.

No basis has been shown to overturn the decision of the ASBCA rejecting this aspect of plaintiff's claim.7/

Before the ASBCA, plaintiff's claim for interest costs, extraordinary damages and attorneys fees were also denied. In the motion for summary judgment filed August 7, 1979, plaintiff does not take specific exceptions to the ASBCA's determinations in this respect. In the opposition brief filed January 2, 1980, plaintiff appears to argue that its claims for additional allocations of

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7/ As to plaintiff's general assertion that "delay" must have increased its costs, such as executive time and travel, no specific delay costs were claimed before the ASBCA and, more importantly, because the building had to be built before the nurse call system could be installed, no showing was made before the ASBCA that the installation work was in any way delayed by reason of the several submittals of equipment which were rejected prior to the approval of the Executone system.

executive salaries and travel cost, interest, extraordinary damages, and attorneys fees are now asserted as a part of its cardinal change or breach of contract claim for which a de novo trial is sought. Given the conclusion reached, supra, that no valid breach of contract claims has been asserted in this matter, and plaintiff's failure to contest the rejection of these claims by the ASBCA, no further discussion as to these items may be required. However, in the event that the discussion in plaintiff's opposition brief is also intended to be addressed to the administrative rejection of these claims, it is concluded that this rejection must be sustained.

With respect to the denial of claimed interest costs, the ASBCA correctly relied upon the applicable

regulation that interest on borrowings was unallowable in the determination of the equitable adjustment required. See Coley Properties Corp. v. United States, 219 Ct. Cl. ___, 593, F.2d 380 (1979).

Plaintiff's claim for extraordinary damages of some $1,500,000 is basically a "lost profits" claim premised upon numerous bids Fidelity submitted for other contracts during the period involved. As such, this lost income claim in no way consists of out-of-pocket expenses directly related to the performance of the nurse call system contract which can appropriately be reimbursed as a part of an equitable adjustment. Coley Properties Corp. v. United States, supra. Moreover, beyond the concept of an equitable adjustment, damages for lost of future business prospects are usually considered too

remote to be recovered in a breach of contract suit. See William Green Constr. Co. v. United States, 201 Ct. Cl. 616, 477 F.2d 930 (1973), cert. denied, 417 U. S. 909 (1974).

As to attorney fees, the record before the ASBCA makes it clear that the sums sought were for prosecution of the instance claim against the United States and as such, they may not be recovered as a part of an equitable adjustment. Singer Co., Librascope Div. v. United States, 215 Ct. Cl. 281, 325-28, 568 F.2d 695, 720-71 (1977); 28 U.S.C. §2412 (1970).

CONCLUSION

As it is concluded that the ASBCA decision awarding plaintiff an equitable adjustment of $234,536.26 is entitled to finality under the judicial review standards of 41 U.S.C. §§ 321,322,

it is recommended that defendant's motion for summary judgment be granted, plaintiff's motion for summary judgment be denied, and plaintiff's petition be dismissed.

IN THE UNITED STATES COURT OF CLAIMS

NO. 86-79C

J. W. BATESON, INC.

V.

THE UNITED STATES

Before FRIEDMAN, Chief Judge, DAVID and KUNZIG, Judges.

ORDER

This case comes before the court on plaintiff's motion, filed December 24, 1980, for rehearing pursuant to Rule 151 (b) with reference to the order entered on December 12, 1980, dismissing the petition. Upon consideration thereof, together with the response in opposition thereto, without oral argument.

IT IS ORDERED that plaintiff's said motion for rehearing is denied.

FEB 6-1981 BY THE COURT

S/Daniel M. Friedman
Chief Judge

SUPREME COURT OF THE UNITED STATES

NO. A-881

J. W. BATESON, INC.,

Petitioner

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner. IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 6, 1981.

/s/ Warren E. Burger
Chief Justice of the
United States

Dated this 30th day of
April, 1981.

CERTIFICATE OF SERVICE

This is to certify that I have, prior to filing, served three copies of the within and foregoing Petition for Writ of Certiorari, on the Solicitor General, Justice Department, Washington, D. C. 20530, by depositing conformed copies of same in the United States Mail, with the proper postage affixed thereto.

This the 5th day of June, 1981.

J. CARLISLE OVERSTREET

Attorney for Petitioner